

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE v. JEFFERY T. COX

**Direct Appeal from the Circuit Court for Grundy County
No. 3227 Thomas W. Graham, Judge**

No. M1999-01429-CCA-R3-CD - Decided July 7, 2000

The judgment of the trial court, amending the defendant's original sentence from one of split confinement to one of continuous confinement in the Department of Correction, is affirmed.

Tenn. R. App. P. 3; Judgment of the Trial Court Affirmed.

WADE, P.J., delivered the opinion of the court, in which RILEY and OGLE, JJ., joined.

Aubrey L. Harper (on appeal), McMinnville, Tennessee, and Philip Condra (at trial), District Public Defender, Jasper, Tennessee, for the appellant, Jeffery T. Cox.

Paul G. Summers, Attorney General & Reporter, Marvin E. Clements, Jr., Assistant Attorney General, and Stephen Strain, Assistant District Attorney General, Jasper, Tennessee, for the appellee, State of Tennessee.

OPINION

The defendant, Jeffery T. Cox, entered a plea of guilt to vandalism between \$500.00 and \$1,000.00. See Tenn. Code Ann. § 39-14-408. The trial court imposed a Range I sentence of one year and eight months. The first year was to be served in the county jail and the last eight months were to be served in a community corrections program. The defendant was to be eligible for work release after service of 90 days. Three weeks after imposing sentence, the trial court set aside the original sentence and ordered the defendant to serve the full sentence in the Department of Correction.

In this appeal of right, the defendant contends that the trial court had no basis to set aside the original judgment and that the original sentence should be imposed. Because Tenn. Code Ann. § 40-35-501(a)(3) requires a felony sentence of two years or less to be suspended upon the release eligibility date, and because the original sentence would be longer than that allowed by the statute, the judgment is affirmed.

The official version of the events leading to the arrest and conviction of the defendant are included in the investigation report prepared by the Department of Correction. It provides that on June 24, 1998, at approximately 12:45 A.M., the defendant forced his ex-wife's 1987 Pontiac Firebird over an embankment, thereby causing more than \$500.00 in damage. Otherwise, there are few references in the record to the underlying facts of this offense.

The defendant argues that the initial judgment of the trial court was in accordance with law and cites the following statute in support of his position:

A defendant receiving probation may be required to serve a portion of the sentence in continuous confinement for up to one (1) year in the local jail or workhouse, with probation for a period of time up to and including the statutory maximum time for the class or the conviction offense.

Tenn. Code Ann. § 40-35-306(a). He submits that the jail sentence is preferable under his particular circumstances and that the trial court, by imposing such a sentence, maintained jurisdiction to grant a work release by modifying the sentence at a later date. See Tenn. Code Ann. § 40-35-315. In support of his argument that he should have been granted a sentence in the local jail or workhouse, the defendant also relies upon a 1989 statute authorizing counties to house state prisoners:

A defendant who is convicted of a felony after November 1, 1989, and who is sentenced to a total sentence of at least one (1) year, but not more than (3) three years, shall not be sentenced to serve such sentence in the department of correction, if the legislative body for the county from which the defendant is being sentenced has either contracted with the department, or has passed a resolution which expresses an intent to contract for the purpose of housing convicted felons with such sentences. If the sentencing court concludes that incarceration is the appropriate sentencing alternative, such defendant must be sentenced in the local jail or workhouse and not to the department.

Tenn. Code Ann. § 40-35-104(b)(1). While conceding that there is nothing in the record to document the fact, the defendant submits in his brief that Grundy County has "for many years contracted . . . to house convicted felons and that the legislative body of Grundy has resolved with express intent to contract with the department in respect to housing state prisoners." It is, of course, the responsibility of the appealing party to establish an adequate record before this court can consider a proposed ground for relief. Thus, the issue must be resolved in favor of the state. That is not, however, dispositive of the case.

At the conclusion of the second and last hearing, the trial court observed that the defendant constituted a threat to the community because of his tendencies to drink to excess and become angry. The trial court expressed particular concern about the defendant's continued efforts

to contact his ex-wife, Karen Cox, who was not only the victim of this offense but also the victim of an arson for which the defendant was convicted in 1995. In that instance, the defendant received a sentence of four years but was granted probation. The trial court had also learned that the defendant, who represented to the court in the earlier hearing that he had quit drinking alcohol, had resumed the practice and had made further threats against his ex-wife. The court expressed concern that not only had the defendant been untruthful but that he had also continued to harass his ex-wife.

The primary issue is whether the trial court had the authority to require a one-year jail term followed by a community corrections sentence of eight months. Tennessee Code Annotated Section 40-35-501(a)(3) provides as follows:

Notwithstanding any other provision of law, inmates with felony sentences of two (2) years or less shall have the remainder of their original sentence suspended upon reaching their release eligibility date.

For a Range I offender, of course, the release eligibility date is 30% of the sentence imposed, less any sentencing credits earned and retained. Tenn. Code Ann. § 40-35-501(c). By our calculations, the release eligibility date would be six months for a sentence of one year and eight months.

In State v. John W. Hill, No. 01C01-9802-CC-00072 (Tenn. Crim. App., at Nashville, Feb. 25, 1999) (no application for permission to appeal), Judge Jerry L. Smith wrote for a panel of this court, concluding that a one-year jail sentence followed by a one-year term in a community corrections program was improper:

It is clear that in enacting § 40-35-501(a)(3), the legislature intended for a felon who received a sentence of two years or less to be released from confinement on his or her release eligibility date, regardless of whether their sentence combined confinement with any other form of punishment. Allowing a court to circumvent a defendant's release eligibility date by imposing a longer period of confinement under § 40-35-306(a) would completely eviscerate the legislative intent behind the enactment of § 40-35-501(a)(3). When the two statutes are read together, it is evident that § 40-35-306(a) allows a court to impose a period of up to one year in the local jail as a part of a sentence involving split confinement, but only if the period of confinement would be completed on or before the defendant's release eligibility date under § 40-35-501.

Slip op. at 2.

It is our view that the decision in Hill controls. While the defendant in Hill argued that he should be sentenced to the Department of Correction rather than to jail and community

corrections because the latter sentence was longer, the application of the law cannot be distinguished from this case. Finally, even if Hill did not control, the trial judge, due to his wide latitude of discretion in matters of sentencing, had a proper factual basis upon which to reconsider the sentence.

When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); see State v. Jones, 883 S.W.2d 597 (Tenn. 1994). "If the trial court applies inappropriate factors or otherwise fails to follow the 1989 Sentencing Act, the presumption of correctness falls." State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992). The Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987). The record in this case demonstrates that the trial court made adequate findings of fact.

Among the factors applicable to probation consideration are the circumstances of the offense, the defendant's criminal record, social history and present condition, and the deterrent effect upon and best interest of the defendant and the public. State v. Grear, 568 S.W.2d 285 (Tenn. 1978). The nature and circumstances of the offenses may often be so egregious as to preclude the grant of probation. See State v. Poe, 614 S.W.2d 403 (Tenn. Crim. App. 1981). A lack of candor may also militate against a grant of probation. State v. Bunch, 646 S.W.2d 158 (Tenn. 1983).

The purpose of the Community Corrections Act of 1985 was to provide an alternative means of punishment for "selected, nonviolent felony offenders in front-end community based alternatives to incarceration." Tenn. Code Ann. § 40-36-103. The Community Corrections sentence provides a desired degree of flexibility that may be both beneficial to the defendant yet serve legitimate societal aims. State v. Griffith, 787 S.W.2d 340, 342 (Tenn. 1990). Even in cases where the defendant meets the minimum requirements of the Community Corrections Act of 1985, the defendant is not necessarily entitled to be sentenced under the Act as a matter of law or right. State v. Taylor, 744 S.W.2d 919 (Tenn. Crim. App. 1987). The following offenders are eligible for Community Corrections:

(1) Persons who, without this option, would be incarcerated in a correctional institution;

(2) Persons who are convicted of property-related, or drug/alcohol-related felony offenses or other felony offenses not

involving crimes against the person as provided in title 39, chapter 13, parts 1-5;

(3) Persons who are convicted of nonviolent felony offenses;

(4) Persons who are convicted of felony offenses in which the use or possession of a weapon was not involved;

(5) Persons who do not demonstrate a present or past pattern of behavior indicating violence;

(6) Persons who do not demonstrate a pattern of committing violent offenses; and

Persons who are sentenced to incarceration or on escape at the time of consideration will not be eligible.

Tenn. Code Ann. § 40-36-106(a).

The defendant had a significant prior criminal history, much of which related to his excessive use of alcohol. Of greater concern is his continuing history of violence against his ex-wife, his lack of amenability to rehabilitation, and his lack of candor with the trial court. Under these circumstances, the trial court had a sound basis to impose a Department of Correction sentence rather than a sentence in the county jail followed by a term in a community corrections program.

Accordingly, the judgment is affirmed.